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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF

VSS INTERNATIONAL, INC.
3785 Channel Drive
West Sacramento, CA

Respondent.

DOCKET NO. OPA 09-2018-0002

**RESPONDENT VSS INTERNATIONAL, INC.'S
INITIAL POST-HEARING BRIEF**

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I. INTRODUCTION

Respondent VSS International, Inc. (“Respondent” or “VSSI”) hereby submits its Initial Post-Hearing Brief, as directed in the Presiding Officer’s Order of June 19, 2019.

As a consequence of prior filings and the evidence adduced at the hearing that occurred May 16, 2019 through May 20, 2019, the following issues remain for consideration by the Presiding Officer respecting liability and, if the Presiding Offices so determines, penalty assessment:

First, while Respondent’s Initial Post-Hearing Brief, for the reasons discussed herein, accepts the Presiding Officer’s prior determination of liability on Count I, Respondent believes that no penalty is warranted respecting that count as the evidence demonstrates strong substantial compliance with the content and intent of the applicable regulation. Second, Respondent’s Initial Post-Hearing Brief contends that EPA has not established liability for Counts II – IV but, to the extent that the Presiding Officer determines otherwise, Respondent views any technical violations at issue in these counts as not warranting a penalty or, if a penalty were to be assessed, only one that is *de minimis*. Third, as to Count V, EPA has not met its burden of presentation or persuasion regarding the applicability of the requirement to prepare a FRP and there should be no finding of liability and, thus, no penalty. Fourth, for the reasons set forth in Section IV, in the event any penalty is assessed, such penalty should be drastically reduced from the overreaching and unsupportable amount EPA is seeking in this case.

II. COUNTS I THROUGH V

A. Count I (Depiction of AST’s in SPCC Plan Figure)

As summarized in EPA’s initial post-hearing brief, the EPA’s position as to Count I is that the Presiding Officer previously found that Respondent’s SPCC Plans (including its 2012, 2014 and 2016 plans) “each failed to have a facility diagram that marked the location and

contents of each fixed oil storage container, as required by 40 CFR Section 112.7(a)(3). Complainant's Initial Post-Hearing Brief, page 10.

More precisely, as stated in the Presiding Officer's December 26, 2018 Order, "[a]s the 2012 SPCC Plan failed to include a facility diagram marking the location and contents of each fixed oil storage container, this plan failed to satisfy the requirements of 40 CFR Section 112.7(a)(3). The Presiding Officer found this violation to have occurred from February 13, 2013 to May 1, 2017.

While VSS respectfully accepts the Presiding Officer's prior ruling, VSS wishes to emphasize that it was in substantial compliance with Section 112.7(a)(3) because the April 2012 Condor report did identify all AST's on Table 3 (particularly, tanks 817, 818 and 848 - the tanks specifically mentioned by the Presiding Officer in the Order dated December 26, 2018).

In Figure 3 of the April 6, 2012 Condor SPCC Plan, these tanks were shown by location and, in each instance, their circumference was outlined. It is true that the interior circular area of these tanks was blacked out on Figure 3 - and thus the tank numbers were not denominated in the interior circle of Figure 3 - but that was for the purpose of distinguishing those particular tanks as Exempt Non-Oil Product ASTs, as the legend to Figure 3 explained. (RX 2, page 30 of 169).

Furthermore, Table 3 of the Condor report (RX 2, page 35 of 169) listed all the AST's and, for each, stated the tank's number, circumference, diameter, height, volume, area and contents and whether or not it was a heated tank. Table 3 specifically referenced AST's 817, 818 and 848.¹ In other words, the required information respecting the location and contents of each

¹ Substantially the same information was included in the 2014 Plan (RX 92 pages 23 – 27 of 140, page 35 of 140, page 100 of 140, and page 115 of 140) and the 2016 Plan (CX 18 page 19 of 161, and pages 22 – 26 of 161). In some instances, the engineer included the tank location and contents on the same page and in other cases it was included in accompanying pages.

fixed oil storage container was included in these plans, albeit not in every case on the same page, though nonetheless proximately located in the report to the facility diagram. To the extent it is determined that this amounts to a technical violation of the regulation, either no penalty should be assessed (as the substantive information that the regulation required to be provided was provided) or, if a penalty is assessed, it should be *de minimis*.

B. Count II (Professional Engineer's Certification)

40 CFR Section 112.3(d) provides in pertinent part that a licensed Professional Engineer must review and certify a Plan for it to be effective to satisfy the requirements of that section.

The Professional Engineer is required in the certification to attest: (i) That he is familiar with the requirements of [Section 112.3(d)]; (ii) That he or his agent has visited and examined the facility; (iii) That the Plan has been prepared in accordance with good engineering practice, including consideration of applicable industry standards, and with the requirements of Section 112; (iv) That procedures for required inspections and testing have been established; and (v) That the Plan is adequate for the facility.”

As to Count II, there is not a dispute that the 2012 Condor Plan met these requirements. RX 2, page 10 of 169. In this case, several witnesses testified that, although the 2012 Condor Plan was in effect during the period in question, VSS in the meantime prepared and submitted to EPA interim plans, including the 2014 Plan and the 2016 Plan, and also including a 2015 Plan, based on the understanding that EPA had promised to provide feedback to VSS in order to permit it to finalize these plans, a promise upon which, the record is clear, VSS relied, ultimately to its detriment (as EPA seemingly had no intention to cooperate with VSS or support it in ensuring compliance). This was based on statements made by EPA both after the September

2013 inspection and the 2014 in person meeting between EPA and VSS representatives in San Francisco, and thereafter, continuing to 2017.²

As was further related in testimony, because EPA did not in fact provide feedback or guidance, as it promised to do, these plans eventually were released to the West Sacramento facility (as they had been submitted to EPA) so that the facility would have a current plan onsite in the event of an emergency.³

As noted above, the parties agree there is no violation for Count II respecting the April 2012 Condor report. However, EPA complains that the 2014 and 2016 Plans – though admittedly cross-referencing Section 112 – did not recite in full the provisions of that section in the attestation. Specifically, for example, in the 2014 Plan, the Professional Engineer’s certification states as follows:

“I hereby certify that I have examined the facility, and being familiar with the provisions of 40 CFR part 112, attest that this SPCC Plan has been prepared in accordance with good engineering practices.”⁴

EPA’s position that the certification in the SPCC plan must essentially regurgitate the entirety of Section 112.3(d) has no support in law or fact -- EPA certainly does not cite to any case law that supports that argument, nor is such a requirement self-evident from the text of the regulation.

² See, e.g., Tr. 444:23 – 447:15; Tr. 499:8 – 500:14.

³ See Tr. 459:11 – 460:3 (“Q: So this plan, which is dated October 24th of 2014, you said it was submitted as a draft to whom? A: To EPA. Q: And why was it submitted as a draft to EPA? A: Because it contained some of these elements of the FRP, and we were trying to get some feedback. Q: And did you get any feedback from EPA? A: No ... Q: So what prompted your decision then to go ahead and issue a plan in January 2015, two or three months later, after this? A: Well, because we – we had done all of this work, and we needed to issue it to the site, and so we, we needed to finalize that and, and submit it to the facility”).

⁴ The 2016 Plan contains an identical attestation. CX 18, page 39 of 161.

To be sure, the regulation requires that the Professional Engineer make a certification. And it is only logical that the certification would be included in the SPCC Plan, as was done here. But the regulation does *not* state that its provisions also must be recited therein in full, as opposed to being cross-referenced, which in this case clearly was done, and there is no explanation offered by EPA as to why this would be the case or what purpose that would serve.

C. Count III (Amending SPCC Plan Within Six Months)

Consistent with the testimony adduced at the hearing, VSS prepared what EPA acknowledges was a compliant SPCC Plan in April 2012 and then, based on a continuing dialogue with EPA beginning in 2013 and continuing into 2017, submitted several updated and enhanced versions of its SPCC in draft form – in fact, one every year for 2014, 2015, 2016 and 2017. *See, supra*, n. 3.

As noted above, the documents were initially published as drafts (for example, RX 92, bearing the date “Current Revision Date: October 24, 2014” and containing a “DRAFT” watermark throughout obviously was submitted as a draft). However, in the interest of ensuring ongoing compliance, at a certain point, once it was became evident that EPA was not in fact going to provide comment or suggestions, these drafts were released to the facility so that it would have as current as possible a version of the SPCC in the event of an emergency. *Id.*

As far as Tank #2001 is concerned, the best evidence of the date it was placed in service after VSS reviewed its records and interviewed its employees, was that the tank was put into operation in March 21, 2013. Tank # 2001 was included in the April 2012 Condor report – it can be seen in an aerial photograph located at CX 16, page 23 of 45 and is specifically called out on Figure 3 (CX 16, page 24 of 45). It is noted in Figure 3 that the tanks is “under construction” but it is included in the plan nonetheless. Furthermore, the 2012 report states: “Two large 2.5 million gallon each ASTs are currently under construction on the southwest part of the Facility.

These ASTs are located in a large concrete lined pit that has been designed to retain a spill from one of the ASTs.” CX 16, page 8 of 45. This information provided in the 2012 Condor report (which remained valid for five years) adequately identified the existence, location and spill response protocols for both Tank # 2001 and # 2002.⁵

Tank # 2001 was included in the October 24, 2014 revision (RX 92, page 36 of 140) and the following language was added: “The large 2.348 million gallon AST is loaded and unloaded via aboveground piping by railcar and truck and trailer..” Although this language was additive of what had previously been included in the 2012 Condor report, no amendment of the plan was required between September 21, 2013 (six months after March 21, 2013) and October 24, 2014 (the date of the next successive SPCC Plan) because the tank was included in the 2012 Condor report.⁶

⁵ 40 CFR Section 112.5(a) does not require an amended plan that chronicles the precise date that a tank goes into service if that tank previously has been identified by tank location, volume and spill containment details, such as was done here. Rather, it provides only that one must: “Amend the SPCC Plan for your facility in accordance with the general requirements in Section 112.7 and with any specific section of this part applicable to your facility, when there is a change in the facility design, construction, operation, or maintenance that materially affects its potential for a discharge as described in Section 112.1(b). Examples of changes that may require amendment of the Plan include, but are not limited to: commissioning or decommissioning containers; replacement, reconstruction, or movement of containers; reconstruction, replacement, or installation of piping systems; construction or demolition that might alter secondary containment structures; changes of product or service; or revision of standard operation or maintenance procedures at a facility. An amendment made under this section must be prepared within six months, and implemented as soon as possible, but not later than six months following preparation of the amendment.”

⁶ EPA continues to contend that the tank first went into service in 2012, based upon the fact that the November 2012 inspection report prepared by Ms. Witul (some ten months after the actual physical inspection) notes that the tank was in operation at that time, or so she recalls being told. At the same time, on cross-examination, Ms. Witul acknowledged that she did not in fact have first-hand knowledge of whether Tank #2001 was actually in operation during her inspection conducted in November 2012, including the fact that she did not see any loading or unloading of materials, or active pipes, or hoses or other conduits or other indicia that the tanks was in use. Tr. 222:5 – 223:10.

As far as Tank #2002 is concerned, the best evidence after VSS reviewed its records and interviewed its employees, was that the tank was placed in operation in January 2016. That this was the case is supported by the fact that Tank # 2002 is not included in the “Current Revision Date: January 15, 2016” version of the SPCC (CX 18, page 45 of 161, referencing only Tank #2001 as being located in the Bulk Asphalt Containment Area). Figure 3 to this plan references Tank # 2002 but identifies it on the diagram as “out of service” and, elsewhere, as “empty,” both concepts being consistent with the tank not yet having been placed in service. CX 18 at 17 and 19.

Likewise, consistent with the foregoing, Tanks # 2002 is depicted in the “Current Revision Date: January 9, 2017 Facility Response Plan (CX 19, page 38 of 86), suggesting that the tank was placed in service sometime after January 15, 2016. Although Tank # 2002 was included in the 2017 FRP and SPCC Plans, the addition of this tank was not by that time a material change that affected VSS’s “potential for a discharge,” 40 CFR Section 112.5(a), because the second large tank was the same size as the first and, as is discussed below in relation to the Facility Response Plan regulations, the requirement that the facility plan for a worst case discharge assumes the loss of its single largest AST, as all experts have testified. Here, the second tank was brand new and merely additive of the first tank (# 2001) and, in any event, as noted above, had been included in the 2012 Condor report, which remained valid until the updated 2017 SPCC. Thus there was no violation of Section 112.5 but, again, were the Presiding Officer to find a violation, such a violation would seem to be very minor and not one warranting a penalty (or, if one is assessed, only a *de minimis*) penalty at most.

D. Count IV (AST Inspection Program)

Count IV of EPA’s Complaint is brought under 40 CFR § 112.7(e). This section requires facility owners and operators to “[c]onduct inspections and tests required by this part in

accordance with written procedures that you or the certifying engineer develop for the facility. You must keep these written procedures and a record of the inspections and tests, signed by the appropriate supervisor or inspector, with the SPCC Plan for a period of three years.” 40 CFR § 112.7(e). The regulations also provide that a facility must “Test or inspect each aboveground container for integrity on a regular schedule and whenever you make material repairs.” 40 CFR §112.8(c)(6). This requires testing to be done “in accordance with industry standards.” *Id.*

EPA has not shown a violation during the relevant period, as modified by EPA’s representations to this Tribunal and VSS: January 1, 2015 to January 30, 2016. Under EPA’s own guidance, baseline tank inspections in accordance with industry standards would not have been required until the end of the five-year cycle of an SPCC Plan. That was not until 2017—well after the relevant period ended.

Even if, however, the entire period initially alleged in EPA’s complaint is considered, EPA has not met its burden to show the “major violation” it alleges. The evidence adduced at the hearing showed that VSS conducted formal external inspections on, replaced, or placed out of service every tank at its facility. Likewise, while VSS’s record of formal internal inspections was not perfect, it inspected several tanks and, as stated, replaced or shut down many others, which resets or eliminates the clock on those tanks. Only a handful of overdue tanks remained. But, in any event, any such violations would fall outside the relevant period, so EPA has not satisfied its burden. Accordingly, judgment on Count IV should be entered in VSS’s favor.

1. EPA’s Prior Submissions To This Tribunal Limit The Potential Liability Period

In its Complaint, EPA alleges a violation “for each day during the period from January 1, 2015, for a total of at least 1,095 days.” Compl. ¶ 65. But EPA limited this time period in its subsequent filings. Most importantly, in its Reply in support of its Motion for Accelerated

Decision, EPA wrote, “Contrary to Respondent’s suggestion, Complainant *is not seeking a finding of liability on this issue after January 2016.*” Complainant’s Reply to Respondent VSS International, Inc.’s Opposition to Complainant’s Motion for Accelerated Decision as to Liability at 17 (emphasis added). When coupled with the Complaint, which has not been amended, the plain meaning of this sentence is that EPA was seeking liability only for the period of January 1, 2015 to January 30, 2016. This Tribunal also appears to have understood EPA’s brief in this manner, noting, “In its Reply, Complainant clarifies that it is not seeking liability for Count IV after January 2016.” Order on Complainant’s Motion for Accelerated Decision as to Liability at 26; *see also id.* at 25 (“Complainant appears to acknowledge in its Accelerated Decision Memorandum that Respondent ceased the violation of 40 C.F.R. § 112.7(e) alleged in Count IV following January 2016.”).

Notwithstanding its unequivocal statement, in its post-hearing brief, EPA attempts to backpedal in a footnote. It argues that “in the context of seeking to establish facts beyond dispute in its August 3, 2018 Motion for Accelerated Decision, [EPA] sought a ruling ‘through at least January 2016.’” Complainant’s Post-Hearing Brief at 19 n.10. But EPA completely ignores its subsequent, clarifying statement *in its Reply Brief*—the statement upon which both the Tribunal and VSS relied—never attempting to explain it at all.

Nor was EPA’s statement (or motion as a whole) in any way limited to the context of a Motion for Accelerated Decision, as it suggests, after the fact. EPA plainly sought accelerated decision for the entire Count, not just for a single year, and nothing in its motion or reply suggests it intended to have a hearing on Count IV liability for after January 30, 2016. To the contrary, EPA’s motion makes clear that “In this memorandum, EPA requests a ruling only on liability, not on the appropriate penalty amount.” Complainant’s Memorandum in Support of its

Motion for Accelerated Decision as to Liability at 1. Presumably, if EPA was not seeking accelerated decision as to certain dates, it would have so stated. It did not.

Consequently, EPA should be bound by its statements to the Tribunal and VSS, and Count IV should be temporally limited to January 1, 2015 through January 30, 2016.

2. EPA Did Not Satisfy Its Burden To Prove A Violation From January 1, 2015 Through January 30, 2016

EPA did not prove a violation during the relevant time period. Nor could it have under its own guidance. In July 2012, the EPA provided a Bulk Storage Container Inspection Fact Sheet for facilities. That fact sheet provides that “[W]hen no or only partial baseline information is available for a container, the Plan preparer should schedule integrity *testing within the first five-year review cycle of the SPCC Plan* to establish a regular testing schedule based on current container conditions and the applicable industry standard.” RX 2 at 58 (emphasis added). The fact sheet provides the following hypothetical: “For this example, the review cycle would begin on the revised rule implementation compliance date of November 10, 2011 and the first (baseline) container inspection or integrity test would be completed by November 10, 2016.” *Id.* Craig Fletcher, of Fletcher Consultants, Inc. (“FCI”), an expert in aboveground storage tanks, used the EPA’s Fact Sheet in preparing VSS’s Integrity Testing Program. Tr. 619:7-11; 620:8-12; RX 9 (Integrity Testing Program prepared by FCI).

EPA, in an attempt to to distance itself from its Fact Sheet, now argues that it only applies to facilities “that don’t have baseline information such as ‘a facility . . . recently purchased.’” Complainant’s Initial Post-Hearing Brief at 18 n.8 (quoting RX 50 at 4). EPA’s interpretation is wrong. First, without disclosing the fact, EPA cites a *different version* of the document than the one VSS cited at the hearing. *Compare* RX 50 (dated August 2013), *with* RX

2 at 55 (dated July 2012). And the version of the fact sheet in RX 2 upon which VSS relied does not contain the purported qualification EPA cites.

But more fundamentally, the “recently purchased” qualification is not a qualification at all. It is merely a few words from an example EPA takes out of context. RX 50 at 4. Neither document limits the circumstances under which its principles apply. Indeed, both speak broadly in terms of “When no or only partial baseline information is available for a container(s) at the facility.” RX 2 at 58; RX 50 at 4. As RX 50 makes clear, purchasing a facility is merely “an example” of when that might occur. There are many others. VSS’s expert testified, “there are literally hundreds of thousands of tanks in the United States that were installed before the advent of the requirement to perform inspections consistent with an industry standard, which [came] into effect in the 2010-2011 time frame.”⁷ In other words, the OPP Regulations were modified to require integrity testing consistent with industry standards, so it makes perfect sense that many facilities would not have the requisite “baseline conditions” before those regulations became effective.

EPA contends that “VSS still failed to complete all of the required inspections within the five-year time frame established in the Fletcher proposal.” Complainant’s Initial Post-Hearing Brief at 18 n.8. This argument, however, ignores the EPA’s narrowed relevant period. During the Hearing, EPA offered no evidence that VSSI violated 40 CFR § 112.7(e) from January 1, 2015 to January 30, 2016. VSSI’s first SPCC plan cycle after the updated regulations became effective starting on April 6, 2012. CX 16 at 3-4. Under the EPA’s own guidance, VSS would

⁷ See also Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements—Amendments, 73 Fed. Reg. 74236-01, 74264 (Dec. 5, 2008) (Final Rule, which modified regulations “to allow an owner or operator to consult and rely on industry standards to determine . . . the type and frequency of integrity testing required for a particular container size and configuration”).

not have been required to perform its baseline inspections until April 5, 2017.⁸ For that reason, according to EPA’s own guidance, VSS was not tardy on its inspections until *at least* April 5, 2017. Nevertheless, as discussed below, VSS performed many inspections within that time frame.

Likewise, EPA offered no evidence that VSS “had failed to keep records of inspections and tests of the Facility for a period of three years” during the relevant period. While EPA has asserted that VSS could not provide documentation of tank inspections during a September 30, 2016 inspection, RX 104 at 9-10, this date falls outside of the relevant period.

In short, EPA has offered no evidence that VSS violated 40 CFR § 112.7(e) during the relevant period, and its claim fails on this basis.

3. VSSI Externally Inspected Or replaced Every Tank at Its Facility And Internally Inspected Or Replaced Most

After VSS’s initial discussions with EPA in 2013, VSS retained FCI—one of California’s premier consultants for tank inspections—to prepare a tank integrity inspection program for its facility. Tr. 607:2-7. FCI prepared this program, which was incorporated into VSS’s SPCC plans. RX 9; Tr. 608:4-8. Consistent with industry standards, FCI’s proposal suggests routine inspections that would be done by the facility, as well formal certified inspections conducted by an authorized or trained inspector on a five- to 20-year cycle. Tr. 611:7-612:16.

EPA does not challenge that VSSI conducted its routine inspections. *See* Complainant’s Post-Hearing Brief at 16.⁹ Instead, at the Hearing and in its Post-Hearing Brief, EPA focuses on

⁸ This is also the conservative date. The Integrity Testing Program did not call for the completion of all inspections until the 2018-2019 Winter Season. RX 9 at 6.

⁹ *See also* Complainant’s Reply to Respondent VSS International, Inc.’s Opposition to Complainant’s Motion for Accelerated Decision as to Liability at 17 (“[T]hese records merely document the weekly informal external inspections performed by Facility personnel and do not demonstrate that Respondent had performed the required formal external inspections.”).

the formal external and internal inspections. EPA provides an incomplete picture of what the evidence demonstrated.

EPA argues that “[t]here is no evidence in the record that Respondent had completed even one Certified External Inspection in the 2014-2015 or 2015-2016 winter season.” This is demonstrably wrong. VSS retained Power Engineering to complete ten certified external tank inspections in February 2015. Tr. 622:8-23. Mr. Fletcher reviewed these reports to confirm that they complied with the industry standard and were accurate. Tr. 623:1-5.

Likewise, as outlined below in Table 1, the documentary and testimonial evidence demonstrates that every tank at VSS’s facility has either (1) had formal external inspections conducted in accordance with industry standards, (2) been replaced,¹⁰ or (3) been placed out of service. As Mr. Fletcher testified, “To my knowledge, yes, they’ve all – all of the tanks at the facility have either been replaced or have had a formal external inspection conducted.” Tr. 628:12-14.

EPA does not even seriously question this evidence, writing in its post-hearing brief that “Respondent’s witness testified that he believed that all *external* tank inspections had been completed but there is no documentary evidence that Respondent has completed the required Certified Internal Inspections.” Complainant’s Initial Post-Hearing Brief at 18. Nor does EPA even contend—let alone offer any evidence—that any of the exemplar external inspection reports that VSS provided failed to comply with the relevant industry standards. For that reason, EPA

¹⁰ Under industry standards, replacing a tank “resets the clock” for the time to conduct formal inspections. Tr. 628:15-629:4. Likewise, Mr. Fletcher testified that if an owner was confident in replacing a tank, there would be no reason to inspect that tank. He offered the following analogy: “[I]f I had a car that I knew was going to go to the junkyard, I would not pay a mechanic to have him come through and tell me that I had bald tires and the engine was bad.” Tr. 634:6-17.

has failed to satisfy its burden of proof as to any of the external tank inspections that VSS conducted.

EPA’s case has therefore been whittled down to only internal tank inspections. And EPA considerably overstates its case when it argues that there “is no documentary evidence that Respondent has completed the required Certified Internal Inspections.” Complainant’s Initial Post-Hearing Brief at 18. As shown in Table 1 below, the record demonstrates that several formal internal inspections occurred, many tanks were replaced (which resets the time required for an inspection), and several others were taken out of service. As to those tanks that received formal internal inspections, the evidence shows that these inspections complied with the industry standard, and EPA provides no evidence to the contrary. Tr. 629:16-630:23.

Table 1 – Summary of VSSI Formal Tank Inspections

Facility Tank Number	External Inspection	Internal Inspection
817	November 2016 (RX 54)	Overdue
818	November 2016 (RX 55)	Overdue
819	Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
821	Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
822	Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
831	November 2016 (RX 56)	Overdue
832	November 2016 (RX 57)	Overdue
833	November 2016 (RX 58) Replaced (Tr. 634:3-5)	Replaced (Tr. 634:3-5)
834	November 2016 (RX 59)	Replaced (Tr. 634:3-5)

835	February 2015 (Tr. 622:8-23) Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
836	February 2015 (Tr. 622:8-23) Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
837	February 2015 (Tr. 622:8-23) Replaced in 2017 (RX 96 at 57)	Replaced in 2017 (RX 96 at 57)
838	February 2015 (Tr. 622:8-23) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)
839	November 2016 (RX 60) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)
848	November 2016 (RX 61)	Overdue
849	February 2015 (Tr. 622:8-23) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)
852	February 2015 (Tr. 622:8-23) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)
854	November 2016 (RX 62)	June 2016 (RX 65)
878	November 2016 (RX 63) Replaced (Tr. 634:3-5)	Replaced (Tr. 634:3-5)
880	February 2015 (Tr. 622:8-23)	Overdue
881	June 2016 (RX 67; Tr. 628:12-14)	June 2016 (RX 67)
882	February 2015 (Tr. 622:8-23)	January 2018 (RX 68)
883	February 2015 (Tr. 622:8-23) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)

886	November 2016 (RX 64) Out of Service (RX 96 at 57)	Out of Service (RX 96 at 57)
2001	2019 (Tr. 640:25-641:1)	Not Yet Due ¹¹
2002	2019 (Tr. 640:25-641:1)	Not Yet Due

In summary, to the extent EPA has proven any violation of the OPP regulations, it is only for overdue *internal* inspections for a handful of tanks. As Mr. Fletcher testified, this is a common issue, as “the industry’s in sort of a state of catch-up” after the OPP regulations changed. Tr. 646:5-18. VSS took good-faith efforts to comply with all of the tank inspection requirements contained in the OPP regulations and did so for the overwhelming majority of tanks at its facilities and its inspection program is consistent with industry standards.

E. Count V (Facility Response Plan)

1. Standard Of Review

At the outset, it is worthy of note that EPA waived its right to require a FRP because it elected not to proceed under Section 40 CFR 112.20(b)(1) and 40 CFR 112.20(c).¹² These

¹¹ EPA concedes that internal tank inspections must occur only ever 10 to 20 years. Complainant’s Initial Post-Hearing Brief at 16 & n.6. While EPA disputes when Tank 2001 was placed into service, even under the date EPA advocates, March 21, 2012, *id.* at 14, the internal inspection would not be due until 2022.

¹²40 CFR 112.20(b)(1) permits EPA to make a unilateral decision respecting whether a facility will be required to prepare an FRP as follows:

“The Regional Administrator may at any time require the owner or operator of any non-transportation-related onshore facility to prepare and submit a facility response plan under this section after considering the factors in paragraph (f)(2) of this section. If such a determination is made, the Regional Administrator shall notify the facility owner or operator in writing and shall provide a basis for the determination. If the Regional Administrator notifies the owner or operator in writing of the requirement to prepare and submit a response plan under this section, the owner or operator of the facility shall submit the response plan to the Regional Administrator within six months of receipt of such written notification.”

(Continued...)

sections entitle EPA unilaterally to require a FRP but, in this case, EPA waived its right to do so by failing to follow the proper procedures in proceeding under these sections.¹³

Thus, as in this case, if the facility determined that a FRP was not required, the facility owner/operator was to have completed and executed Attachment C-II – Certification of the Applicability of the Substantial Harm Criteria. VSS did this in this case. RX 40, pages 42 – 43 of 45. *See also* 40 CFR 112.20(e) (“If the owner or operator of a facility determines pursuant to paragraph (a)(2) of this section that the facility could not, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, the owner or operator shall complete and maintain at the facility the certification form contained in appendix C to this part”).

Likewise, 40 CFR Section 112.20(c) provides as follows:

“The Regional Administrator shall determine whether a facility could, because of its location, reasonably be expected to cause significant and substantial harm to the environment by discharging oil onto or on the navigable waters or adjoining shorelines, based on the factors in paragraph (f)(3) of this section. If such a determination is made, the Regional Administrator shall notify the facility owner or operator in writing and (1) Promptly review the facility response plan; (2) Require amendments to any response plan that does not meet the requirements of this section; (3) Approve any response plan that meets the requirements of this section; (4) Review each response plan periodically thereafter on a schedule established by the Regional Administrator provided that the period between plan reviews does not exceed five years.”

¹³ In this Tribunal’s December 26, 2018 Order On Complainant’s Motion For Accelerated Decision As To Liability, page 31 n. 28, this Tribunal specifically noted: “To the extent Complainant is attempting to assert an argument that the 2014 Letter is a formal determination of the Regional Administrator compelling Respondent to submit a FRP pursuant to 40 C.F.R. Section 112.20(b), it is notable that it has not alleged this as a basis that the Facility required a FRP in the Complaint, and otherwise has not provided support that the 2014 Letter meets the requirements of such a determination established in 40 C.F.R. Section 112.20(b).”

This distinction is of paramount importance in this case for the reasons that are discussed in detail (and with supporting citations) below and that were the subject of significant testimony at the hearing, including:

(i) the fact that EPA changed its position regarding the potential applicability of a FRP in this case multiple times (at first acknowledging it did not know if one was required (RX 45 and RX 46), then agreeing to a “modified” FRP (Tr. 499:8-500:14), then agreeing to have further discussions regarding the engineering aspects of any FRP, then instituting enforcement);

(ii) the fact that EPA promised to work with VSS in formulating a FRP that would be suitable for the facility (and then failed to do so, electing instead to commence this litigation);

(iii) the fact that EPA promised in writing to provide its feedback to the 2015 WHF Substantial Harm Criteria and then never did so -- again, electing instead to pursue this enforcement action;

(iv) the fact that EPA commissioned a FRP analysis by Mr. Michaud in 2016 but never disclosed that fact to, or shared it with, VSS during a period of time during which VSS could actually have considered and had a dialogue with EPA regarding EPA’s supposed technical analysis -- instead producing the Michaud report only two years after the fact and after this litigation had been commenced; and

(v) the fact that EPA prepared in September 2017 an internal memorandum of supposed deficiencies respecting VSS’s 2017 FRP that it likewise never sent to VSS (CX 24), while nonetheless complaining that (and filing this action in part based upon the contention that) VSS had not adequately addressed EPA’s’ concerns with its most recent FRP.

This type of approach to enforcement should not be countenanced by this Tribunal. Rewarding the type of actions and tactics that EPA has demonstrated in this case toward a

company that obviously invested significant resources and efforts in attempting in good faith in meaningful compliance – even if it is found that it was not “practically perfect in every way” – especially within the context of a regulatory scheme the contours of which were and are continuing to evolve, would undermine trust in the agency by the regulated community and serve only to disincentivize the industry from attempting to reach a common ground with EPA in coming into compliance. As EPA must concede (and as it does in its Complainant’s Initial Post-Hearing Brief), it is incumbent upon EPA in this case to bear “the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.”¹⁴

For all of the foregoing reasons, and many more, which are further discussed below, EPA cannot under any circumstance be viewed as having satisfied its burden of presentation and persuasion on either of the two bases upon which it contends that a FRP was required, namely, 40 CFR 112.20(f)(1)(ii)(A) (alleged lack of adequate secondary containment (either as to the containment wall height issue or as to the inactive status of Tank # 865)) and 40 CFR 112.20(f)(1)(ii)(B)(causing injury to a fish and wildlife sensitive environment), each of which is discussed in turn immediately below.

2. Alleged Lack Of Adequate Secondary Containment

a. Bulk Asphalt Area Containment Wall Height

EPA’s claim that VSS lacked adequate secondary containment should be summarily rejected. The claim is based principally on a completely unsupported assumption made by EPA’s expert William Michaud, which in turn is based upon suppositions he arrived at during his review of the Haley and Aldrich report to the effect that the containment wall surrounding the

¹⁴ Complainant’s Initial Post-Hearing Brief at 10.

large aboveground storage tanks was – “possibly” -- only three feet two inches high and/or only had structural integrity to that height and, as such, “possibly” would not provide adequate containment for a hypothesized worst case discharge. Complainant’s Initial Post-Hearing Brief, pages 21-23. As is discussed below, Mr. Michaud’s testimony on this point is equivocal, at best, and the weight of the evidence is that there is no reason to conclude that the wall is not structurally sound and in fact it is probably not just over four feet but in fact over five feet (based on an actual site survey).

The Haley and Aldrich report, dated January 10, 2014, included as Figure 3 to that report (entitled “Detail of Asphalt Cement AST Containment Area Dike Wall (provided by VSS) (not to scale), which is set forth at RX 89, page 13 of 26. This figure unequivocally shows the height of the containment wall as 4’2”.

The figure also contains a reference to a 3’2” “Max Fluid Ht.” This reference to “Max Fluid Ht.” is not otherwise explained. As has been noted elsewhere, none of EPA’s FRP experts ever visited the VSS site and they do not even profess to know what this is reference is or what it is based upon. Indeed, the only thing that can be gleaned for certain from the “Max Fluid Ht.” reference is that the reference clearly is not the height of the containment wall because, as is noted in the same figure, that containment wall height was measured to be four feet two inches high and explicitly noted as such.¹⁵

¹⁵ Moreover, the Haley and Aldrich report refers to the height of the containment wall in the text of the report as being “approximately 4-feet (ft) high”, RX 89 page 5 of 26, and again as being “approximately 4-ft high”, RX 89, page 15 of 26, and again as being four feet high in Appendix B, RX 89, page 26 of 26.

In Mr. Michaud's August 23, 2016 FRP applicability report,¹⁶ CX 14, he notes in Section 2 (Summary of Information Reviewed) that he reviewed the Haley and Aldrich report. Later in his report, he admits that it was "unclear" to him "whether [the 3'2"] fluid height was the basis for the structural design of the wall" and said that, at most, the fact that a structural engineer intended to make such a notation that conveyed such a meeting was only a "possibility." CX 14, page 7 of 20. This does not satisfy EPA's burden of presentation or persuasion.

Mr. Michaud also analyzed the secondary containment adequacy based on the wall being 4'2" (the stated height of the wall), which he also viewed to be "possible," and concluded that, under that scenario, "the secondary containment appears to be sufficient to contain the capacity of one of the asphalt cement ASTs." CX 14, page 8 of 20. He repeated these conclusions in his declaration, CX 55,¹⁷ and at the hearing, where he stated, in part:

¹⁶EPA did not even disclose to VSS that it had commissioned its own FRP applicability study (much less did EPA provide VSS with a copy of that report so that VSS could understand and take into consideration EPA's supposed concerns) until May 4, 2018 (RX 91, page 1 of 2) -- well after this litigation was commenced. EPA should not be rewarded for these types of "lying in wait" enforcement tactics. This is especially the case regarding this specific issue (*e.g.*, EPA's comments on VSS's Substantial Harm Criteria report) where EPA promised VSS nearly three years earlier that "EPA will review this information [WHF's Substantial Harm Criteria Determination, RX 21, page 1] and follow up with our impressions and any questions we may have." RX 22, page 1 of 1. Not only did EPA not follow up -- as promised -- but it in fact concealed that it had commissioned its own FRP report which it then did not provide to VSS for almost two years. *See also* Tr. 543:5-11: [Testimony of Lee Delano]: Q: Do you recall the first time that report [Mr. Michaud's August 2016 report] was supplied to WHF, approximately? A: Seems like we were reviewing that in 2018. What date exactly I don't recall. Q: Okay. To your knowledge, had you received a copy of it in 2016 or even in 2017? A: Not that I recall." Nor was this the only time EPA withheld key information from VSS which it now seeks to capitalize on in this enforcement proceeding -- Ms. Witul's testimony also corroborates the testimony of VSS witnesses that EPA failed to transmit its comments regarding VSS's May, 2017 FRP (documented by EPA internally in September 2017 but never transmitted to VSS), but Ms. Witul's September 2017 report was produced to VSS only during the prehearing exchange after EPA filed its complaint in this action. Tr. 227:13-24.

¹⁷ In his declaration Mr. Michaud stated: "If the containment wall is designed for a maximum fluid height of 3'2", the addition of AST # 865 does not change the conclusion that (Continued...)

Q: Are you a structural engineer, Mr. Michaud?

A: I am not...

Q: And so the word 'max' to me, in this diagram, made me think twice. So what I did is I looked at the Haley & Aldrich calculations and saw what they used, and they used a four-foot zero in their calculation. So I adopted that as, as the basis for my calculations ...

Q: Does that affect your conclusion if you use a four-foot or four-foot-two wall height?

A: It does not.

Q: So it would be sufficient in that case?

A: Correct..”

Tr. 286:10 – 291:6.

Indeed, quite contrary to Complainant's characterization of Mr. Michaud's testimony as stating that the 3'2" level was "the most reasonable value to use," Complainant's Initial Post-Hearing Brief, page 22, Mr. Michaud said nothing of the sort. What he said, as noted above, was that it was "unclear" to him what the 3'2" reference meant, and that he had to "think twice" about it, but that it could be that whomever the structural engineer was (if even there was one, as the figure does not establish that fact), that this hypothetical structural engineer¹⁸ might have meant to convey that that height corresponded with the structural integrity of the wall. This is

secondary containment is insufficient; it would strengthen this conclusion; and [i]f the containment wall is designed for fluid depths as great as the full height of the wall, the addition of AST # 865 does not change the conclusion that secondary containment is sufficient.”

¹⁸ It is also notable that EPA's witness Mr. Swackhammer testified that while secondary containment can be an engineered structure, it need not be so (“Secondary containment could take the form of a containment dike, a engineered structure surrounding the tanks, and then with sufficient freeboard for a ring and sufficiently impervious would be considered adequate containment so to speak. You can also have remote impounding, and that would satisfy containment as well”). Tr. 93:19 – 25.

conjecture upon speculation upon assumption and certainly cannot be relied upon by EPA to satisfy its burden of presentation and persuasion, especially since EPA's own expert admitted that he did not know himself for certain whether the facility lacked adequate secondary containment or not and admitted that if the containment was calculated using the stated wall height, then the containment was sufficient.

Mr. Michaud did not, in his 2016 report, identify the WHF 2015 Substantial Harm Criteria report as a document he reviewed, even though it had been provided to EPA by VSS over a year earlier. VSS does not know whether EPA did not supply what would seem to be a key document to Mr. Michaud for Mr. Michaud's analysis (which EPA had had for over a year prior to the issuance of Mr. Michaud's report) or whether Mr. Michaud for some reason chose to disregard it. However, had he reviewed this document, he would have discovered that, in Appendix B (Calculations), there were no less than thirty (30) *surveyed* measurements of the height of the containment wall shot throughout the entirety of the containment area that confirm that the average height of the wall is actually over five feet (5.105 feet, to be exact).¹⁹

This is further confirmed by the text of the WHF report which states that "[t]he 2.38 million gallon tanks is a vaulted tank, meaning that part of the spill containment is subsurface and therefore is a man-made depression that would not fail in a catastrophic event. The containment structure is a concrete block wall that is an average height of 5 feet however, 1.9ft. (on average) is below the surrounding grade...." RX 88, page 5 of 41.

Inasmuch as EPA's entire argument on this point rests on a fact that is not in the record except as, at most, a supposition, and given that EPA had access to VSS's facility and certainly

¹⁹ This figure was calculated by subtracting each of the "ground" levels from the "top of wall" levels and dividing the total number of shots (30) by ten (the number of points, each point referencing three shots). RX 88 page 29 of 41.

could have established this fact (or the absence thereof, which is just as, if not more, likely), its argument on secondary containment based on the height and/or structural strength of the bulk asphalt containment storage area wall is not persuasive or even reasonable.

b. Tank # 865

EPA's arguments respecting the presence or absence of Tank # 865 from the Bulk Asphalt Containment Storage Area are likewise unavailing. Although EPA does not address this issue, it is noteworthy that, during the relevant timeframe, Tank # 865 was not within an "aboveground storage area," as is required by 40 CFR 112.20(f)(1)(ii)(A) -- as Tank # 865 had been empty and out of service since 2004 (a fact which is not disputed in the record) and was thus located outside of any active production areas at the VSS facility. *See* Declaration of Kari Case In Support Of Respondent VSS International, Inc.'s Opposition To Motion For Accelerated Decision, dated August 20, 2018, Par. 7. EPA fails to address this regulatory prerequisite.

In Paragraph 7 of her August 20, 2018 Declaration, Ms. Casey corrects a conclusion reached by Mr. Swackhammer that Tank # 865 was in the product manufacturing and storage area and clarifies that "Tank 865 has been permanently out of service since December 2004."

This fact also is actually corroborated by both of Janice Witul's inspection reports. First, her September 23, 2013 report (which relates to a November 27, 2012 inspection) does not reference Tank # 865 (CX 4) as being included in her inventory of active tanks at the facility in 2012. Second, although in her November 28, 2016 report she spots the tank, she nonetheless confirms that it is empty. *See* CX 9, page 7 of 19 ("Photograph of an empty, but not permanently closed, bulk storage tank without any apparent secondary containment").

However, if one reviews the photographs of Tank # 865 in the Powers Engineering and Inspection, Inc. report of June 1, 2016 RX 66, it can be seen that Ms. Witul was did not look closely enough and/or was mistaken – as the tank meets all of the conditions specified in the

definition of “permanently closed” in 40 CFR 112.2 (RX 66, pages 18-27 of 33), including in particular the following:²⁰

(i) the tank is clearly marked “**EMPTY**,” (DSCF2553.JPG, DSCF 2515.JPG, DCSF 2555.JPG, DCSF 2556.JPG, DCSF 2580.JPG) as well as being clearly marked “**NOTICE: OUT OF SERVICE**” (DSCF2537.JPG, DSCF2534.JPG, DSCF2538.JPG)²¹;

(ii) the lines have been blinded (DSCF2560.JPG)

(iii) the valves are capped and are disconnected (DSCF2553.JPG, DSCF2555.JPG and DSCF2559.JPG)

(iv) the tank mixer is disconnected (DSCF2526.JPG); and

(v) the tank heater is disconnected (DSCF2542.JPG and DSCF2543.JPG).²²

²⁰ There is no evidence to the contrary. In fact, when Ms. Witul was examined at the hearing regarding Tank # 865, the following answers were given to the following questions (Tr. 220:12-221:18: “Q: Okay, and I believe that what you were referring to a second ago – and we can – we can look at the report, but there was some review of the secondary containment that had been done and submitted to EPA that indicated that Tank 865 was – which you mentioned earlier, there was a typo where -- Q: And are you – are you aware that VSS’s consultant, WHF, had subsequently advised EPA that there had been a transpositional error and the tank was actually empty and not full, and that that affected the secondary containment calculations? Did you ever hear or see that? A: I believe that’s what I was thinking of, yes....Q: Okay. Now, on that point, do you, as you sit here today, have any views or opinions about whether that correction by WHF’s – or by VSS’s consultant is accurate or inaccurate, or contradicted by anything?...Q: Oh, today, okay. So is it – is it fair to say your answer is you don’t have an opinion one way or the other? A: I suppose that’s fair to say.”

²¹ Moreover, as a matter of basic common sense, this tank could not be filled or emptied without insulation (or, for that matter, a loading rack), both of which clearly are absent.

²² It is exactly because the tank could not be used (and its fittings, pumps, heaters and valves disconnected) that the tank was not in an “aboveground storage area,” which also is a prerequisite to the determination made under 40 CFR 112.20(f)(1)(ii)(A) (*i.e.*, it was in an inactive production area precisely because it could not and was not going to be used). *See also* Tr. 457:24-458:2: “Well, that tank, 865, should have been identified, I believe, as 880, and it got – it was incorrectly identified as in spill containment and it was not. It never has been.”

For the foregoing reasons, EPA's argument regarding lack of secondary containment on this ground also must be rejected.

3. Lack of Applicability of Substantial Harm Criteria

As set forth in 40 CFR Section 112.20(f)(1)(ii)(B), the elements of a prima facie case for injury to a fish and wildlife and sensitive environment are as follows:

1. The facility's total oil storage capacity is greater than or equal to 1 million gallons. (There is not a dispute that this element is satisfied in this case.)
2. The facility is located at a distance (as calculated using the appropriate formula in appendix C to this part or a comparable formula) such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments.²³
3. The second element can be parsed into the following sub-elements, each of which are discussed in turn:
 - a. *The facility must be within the distance, calculated using the formula in appendix C, such that a discharge could reach a fish and wildlife and sensitive environment.*

i. Preamble

The preamble to Appendix C states: "The flowchart provided to Attachment C-I to this appendix shows the decision tree with the criteria to identify whether a facility "could reasonably be expected to cause

²³ The regulations further states: "For further description of fish and wildlife and sensitive environments, see Appendices I, II, and III of the 'Guidance for Facility and Vessel Response Plans: Fish and Wildlife and Sensitive Environments (see appendix E to this part, section 13, for availability) and the applicable Area Contingency Plan prepared pursuant to section 311(j)(4) of the Clean Water Act."

substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines.”²⁴

ii. Flowchart

The flowchart in Attachment C-I defines the relevant planning distances.

The flowchart in Attachment C-I is entitled “Distances that Shall Be Considered to Determine the Planning Distance.” It contains the distances (D1, D2, D3 and D4) that are set forth in the experts’ reports and as to which testimony was presented at the hearing.

iii. Attachment C-III

The calculation of the planning distances is set forth in “Attachment C-III –Calculation of the Planning Distances,” which is set forth in Sections 1.0 (Introduction) through 5.0 (Oil Transport Over Land).²⁵ EPA’s witness

²⁴ The preamble further states: “In addition, the Regional Administrator has the discretion to identify facilities that must prepare and submit facility-specific response plans to EPA.” However, as noted above, EPA waived its right to require a FRP pursuant to these provisions and thus this provision is not applicable in this case.

²⁵ Although EPA asserts that “[w]hile calculating the planning distance is not necessary for determining FRP applicability,” Complainant’s Initial Post-Hearing Brief at 27, this is flatly contradicted by the regulations, which do not distinguish the use of Attachment C-III for a “planning distance” as opposed to an “applicability” determination. EPA cites no authority for this position and none can be derived from the regulations. In fact, in Section 1.3, the regulations clearly address this distinction and make clear that the only situations in which “applicability” and “planning distance” can be decoupled are where either: (i) the FRP requirement arises from some other section of 40 CFR (f)(1)(ii) (the example cited in Section 1.3 is (f)(1)(ii)(A), *i.e.*, lack of adequate secondary containment) or, where the potential applicability arises from potential injury to fish and wildlife and sensitive environments, where “it is clear without performing the calculation (*e.g.*, the facility is located in a wetland) that these areas would be impacted.” EPA’s does in fact make the remarkable claim that VSS should be deemed to be the equivalent of being located in the equivalent of a wetland, Complainant’s Initial Post-Hearing Brief at 26-27, but offers no support for what would otherwise seem to be a rather astonishing proposition. *See* 40 CFR 112.2 (defining wetlands as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that (Continued...)

Joseph Swackhammer, who is with EPA's Washington, D.C. Office of Emergency Management, Regulations and Implementation Division and is national lead on Facility Response plan coordination with the regions and the regulated community, likewise equated FRP applicability with the calculation of FRP planning distance. Tr. 49:9-60:12. *See also* Tr. 63:10 – 14 (Q: So could you explain – you explained D-1, D-2 and D-3. Could you explain for us D-4, what it is on the illustration? A: Sure. D-4 is also part of the applicability evaluation.” Indeed, although on redirect Mr. Swackhammer attempted to shoehorn into the regulations EPA's position that a FRP is “automatically” required for every facility within a half-mile of a navigable water, notwithstanding his multiple efforts to do so, Mr. Swackhammer was completely and utterly unable to identify or explain the basis for this assertion in the regulations, despite trying to do so several times and in several different ways. Tr. 109:2 – 118:23. Indeed, he at the same testified (contrariwise, but supporting VSS's position) that “overland transport of oil” is required to be evaluated along with the D1 through D4 planning scenarios. Tr. 66:9 – 18. *See also* Tr. 70:13 – 18 (“Yes, you typically use the planning distance for applicability evaluations, and then you re-use that planning distance for planning development. It's an important component of what's called the

under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions”). It is obvious from the many facility photographs, including but not limited to CX 1, that the facility is not inundated or saturated by surface or groundwater at a frequency and duration sufficient to support (and that under normal circumstances do support) a prevalence of vegetation typically adapted for life in saturated soil conditions.

vulnerability analysis that's part of the plan development"). *See also* Tr. 9:19 – 20:13 (“Q: Right. In other words, if you’re within a half a mile, you’re required to do the planning distance, and doing the planning distance is part of answering the ultimate question of whether an FRP is required. A: That’s correct. Q: Okay. One last question. Have you ever seen a situation where a facility might be doing both a 5.0 overland transport analysis and a D3 navigable water analysis as part of answering the ultimate question of an FRP. A: Certainly, that’s part of the reason for including section 5.0 in consideration of oil transport over land. So that’s definitely envisioned. Even though it’s not depicted here in Figure C-1, certainly the nearest opportunity, if there is no storm drain within that particular flowpath, then it would be a oil transport over land flow path to the navigable water, be it a sheet flow or via open channel congruent flow, something along those lines.”

iv. The Regulation Does Not Contain An “Automatic FRP Requirement” For Facilities Within One-Half Mile Of A Navigable Water

As is alluded to above, EPA seemingly has taken the position that preparation of a FRP is “automatic” if a facility is within one-half mile of a navigable water. However, EPA has not elucidated an interpretation of the regulations that supports such a position and, indeed, were this in fact the case, the FRP regulations no doubt would be much simpler. As is noted in Section 1.3, unless the facility is located, for example, in a

wetland, the regulation is clear that a regulated facility must perform a planning distance calculation and that calculation is also the applicability formulation for 40 CFR (f)(i)(ii)(B): *See* Section 5.1: “Facility owners and operators *must* evaluate the potential for oil to be transported over land to navigable waters of the United States. The owner or operator must evaluate the likelihood that portions of a worst case would reach navigable waters via open channel flow or from sheet flow across the land, or be prevented from reaching navigable waters when trapped in natural or man-made depressions excluding secondary containment structures.”²⁶

b. *The facility is located at a distance such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments.*

i. “Fish and wildlife and sensitive environments includes Area Contingency Plans. In this case, EPA asserts that VSS is within the ACP2 – GRA8 Area Contingency Plan area. RX 83, pages 1,

²⁶ EPA’s argument that evaluating oil transport over land is impermissible where a facility is within 0.5 miles of a navigable water is contradicted both by the language of the regulation and the analysis undertaken and presented by their expert (which analyzed flow over land despite the fact that VSS is within 0.5 miles of the SRDWSC). Section 5.5 does not say or even suggest that the mandatory evaluation of oil transport over land provided for in Section 5.1 is not applicable when a facility is within 0.5 miles of a navigable water; rather, it simply states that when a facility is within 0.5 miles of a navigable water it must complete the planning distance D3 for the type of navigable water near the facility, a calculation that VSS performed and submitted to EPA. This interpretation is consistent with the description of D3, which is the “[d]istance downstream from the outfall within which fish and wildlife and sensitive environments could be injured or a public drinking water intake would be shut down as determined by the planning distance formula.” In this case, it is undisputed that the VSS facility does not have an outfall directly into the SRDWSC. Thus, Section 5.4 (containing the definition of D3) must be read in conjunction with Section 5.1 (containing a mandatory requirement of a calculation of the transport of oil over land – *unless*, the facility is within a wetland (which, for the reasons stated above, is clearly not the case here).

57 and 58 of 107. (This is the only fish and wildlife and sensitive environment upon which EPA makes this assertion, Complainant's Initial Post-Hearing Brief at 25-26.) Despite EPA having in its employ, and having called as expert witnesses in this case, what EPA characterized as national experts on Area Contingency Plans and fish and wildlife and sensitive environments, neither of these witnesses was able to locate the VSS facility within the ACP2 – GRA8 zone.²⁷ For example, EPA's first witness was Daniel Meer, the Assistant Director in the Superfund Division overseeing "emergency response, emergency planning and preparedness for oil discharges and chemical releases," which, as he explained, encompasses SPCC and FRP Plans. Tr. 16:3 – 17:10. On direct, Mr. Meer surmised that VSS was within GRA8 "[g]iven that VSS is in Sacramento," Tr. 20:17 – 18; *see also* CX 33. (VSS notes that this is actually incorrect as VSS is in *West* Sacramento, not Sacramento and, in fact, is in a different county than Sacramento (Sacramento is in Sacramento County, while West Sacramento is in Yolo County, as was established, among other references, by the testimony of Michael Sears, who is a Hazardous Materials Specialist with the Yolo County Department of Environmental

²⁷ After Mr. Meer was unable to identify the VSS facility as being within a fish and wildlife and sensitive environment, EPA's counsel directed Mr. Meer to read an excerpt of the text of ACP2-GRA8 (CX 2) verbatim into the record, but that only proves that Mr. Meer can read. It does not prove anything else. Tr. 36:8-18.

Health). Likewise, on direct, Mr. Meer was unable to identify the Sacramento Deep Water Shipping Channel: (A: "I think I would have a little trouble doing that." Tr. 22: 18 – 24). After prompting by EPA's counsel, Mr. Meer restated his testimony as follows:

"Q: That's marked with a red dot, maybe the – two-thirds of the way up the left side of the page? A: Yeah, it's – forgive my spatial problems. It's a very straight line compared to the river, so it's easily identified, now that I see it, as the ship channel. Tr. 23: 10 – 15. In any event, even with assistance from his counsel, at most this only establishes that Mr. Meer was finally able to identify the channel; he did not identify the VSS facility, which remains part of EPA's burden to establish. This lack of understanding on the part of Mr. Meer of where the facility is in relation to the Area Contingency Plan boundaries was further confirmed by the following exchange: "Q: Okay. Sir, have you been to the VSS facility? A: I have not. Q: Okay. Do you know precisely where it is located? A: I believe I saw an address on Channel Drive, but I don't recall the number. Q: Okay. On this exhibit before you, CX 33, can you describe for me where within GRA-8 the VSS facility would generally be located within this roughly rectangular box? A: Yes. No. I would not be able to do that. Tr. 28: 21 – 29:8. And upon further testimony by the Presiding Judge the witness testified as follows: JUDGE BIRO:

Okay. Do you know whether any of the facilities identified on this map are the respondent's facility? THE WITNESS: I don't know. Tr. 45: 15-18. As EPA failed to meet its burden of presentation and persuasion on this point, as well, it has failed to establish that a FRP was required for the VSS facility as it failed to present evidence that VSS is within a fish and wildlife and sensitive environment or in a location such that a discharge from the facility would impact such an area.²⁸

- ii. Also, as noted, it must be established that the discharge would be likely to cause injury to fish and wildlife and sensitive environments. "Injury" is defined in Section 112.2 as follows: "Injury means a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions

²⁸ Although the passage cited above which EPA's counsel directed Mr. Meer to read into the record verbatim purports to describe the ACP as including the channel "from the Port of Sacramento to its mouth on Cache Slough," RX 83, page 56 of 107, this document itself is internally inconsistent in at least the following respects: (i) the "Site Strategies" set forth at RX 83, page 57 of 107 only include Cache Slough and east of the Port (neither of which are in the vicinity of the VSS facility); (ii) the location of the VSS facility also is not included in the "Strategy Diagram – Sacramento River Deep Water Ship Channel," RX 83, page 58 of 107; and (iii) the VSS facility also is not within the vicinity of ACP GRA8 2-859 that is identified as being in the vicinity of Liberty Island, as depicted at RX 83, page 1 of 107 (which is depicted as a red bull's eye just above and to the left of the entry for "Solano County"). In short, the Area Contingency Plan, at least insofar as the Sacramento River Deep Water Shipping Channel is concerned, raises more questions than it answers, and EPA did not answer the most basic of these questions, namely, where the VSS facility is in relation to the applicable ACP. This was part of EPA's burden of presentation and persuasion and it did not satisfy it in this case.

Abstract

resulting from a discharge.” EPA did not, either in its expert reports or at the hearing, satisfy its burden of presentation and persuasion regarding this element of its prima facie case either.²⁹ Thus, in addition to the other reasons set forth above, EPA as a matter of law cannot prevail on its Count V.

III. VSS’S ANALYSIS THAT A FRP WAS NOT REQUIRED WAS ROBUST, DETAILED, AND APPLIED IN ACCORDANCE WITH A MODEL ENDORSED BY EPA’S EXPERT

Although not required to carry this burden at the hearing, VSS, through both its June 23, 2015 Substantial Harm Criteria report (RX 88) and the testimony of Kari Casey and Lee Delano, presented a compelling case that a FRP was not required. That case applied specific and scientifically sound site data that had been gathered by WHF to the FRP regulations. (As noted

²⁹ The words describing the finding that must be made in this regard do not appear in the record. To be sure, there was some general testimony to the effect that asphalt cement can create an oil sheen (“like the rainbow you might see in a parking lot on a rainy morning”), *see* Tr. 55:2-14 as well as a general observation that was made that asphalt cement contains lighter and denser molecules (*i.e.*, “floaters” and “sinkers”) -- but no witness testified that a discharge from the VSS facility would result in anything that was described by a competent expert as “a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of [the SRDWSC] resulting either directly or indirectly from exposure to a discharge, or exposure to a product of reactions resulting from a discharge. EPA also relies in Complainant’s Initial Post-Hearing Brief, page 30, on the (again, unsupported but -- more to the point, insufficient --for the purpose of this particular regulation) assumption that “it is generally accepted that one gallon of oil can contaminate a million gallons of water”). Rather than proving this element of its prima facie case, EPA seems rather to have simply assumed that a FRP was required if it established that any amount of oil reached the channel (which VSS disputes but acknowledges seems to have been EPA’s assumption). *See* Tr. 306:19-307:2 (Testimony of William Michaud) (“I concluded that as soon as that material reaches that, that resource, it will cause injury to that, it will impact that environment, so my conclusion in, in my report was that D3 is some value greater than zero because it will – it will move into that, that body of water. I established that through my calculation, if it moves into that body of water by **one inch**, it will – it will have impact to that body of water, according to the regulations”) (emphasis supplied). With due respect to Mr. Michaud, his opinion in this regard is not just an oversimplification, it is a distortion – there is a world of difference between “one inch” of oil in the water (assuming, *arguendo*, that that was established, which it was not) and “a measurable adverse change, either long-term or short-term, in the chemical or physical quality or the viability of [the SRDWSC].”

elsewhere, this report was provided to EPA in the summer of 2015 and EPA never responded to it, except by filing this enforcement action in 2018.)

To recapitulate, the main points of WHF's review and analysis (based on multiple site visits, *surveyed* topographical data, review of technical documents, such as the structural plans for the large ASTs, scientifically accepted calculations and modeling (particularly, the use of the Guo model, which experts for all parties endorsed) were as follows:

- The volume of the largest AST (2.38 million gallons) was used as the input for a worst-case discharge
- The volume of the man-made depression (that is, the subgrade excavation around the large tank that cannot fail in a catastrophic release scenario was measured, assuming a 100% tank loss³⁰
- An adjustment for displacement of the tank was made
- The model presented by James Guo of the University of Colorado at Denver, Department of Civil Engineering was employed to calculate an "initial wave height" as well as "to determine through an iterative process (solving simultaneously) the total distance of flow, and the average flow velocity on a sloping ground surface" using the following inputs and calculations:³¹
 - Total tank volume

³⁰ For reasons articulated by Mr. Delano regarding the offset grid construction, the large welded steel beams and the welded steel roof, *see* RX 69, page 1 of 4), this type of a failure is not within the realm of being reasonably foreseeable, even assuming if it is possible at all, though it was nonetheless used for purposes of conducting the FRP analysis. Tr. 5321:24-536-12.

³¹ The Guo model considers the viscosity of asphalt, *see, e.g.*, RX 88, page 8 of 41 ("the model presented by James Guo ... takes into account the inherent properties of asphalt oil ...")."

- Portion of tank lost
- Portion contained on site
- Total spill volume (gallons and cubic feet)
- Uncontained spill volume
- Initial radius of travel
- Final radius of travel
- Spill angle
- Surface area of asphalt spread
- Thickness of asphalt layer
- Average flow velocity
- Travel time

Based on these calculations and modeling, WHF concluded that “[a] flow from the site would not reach navigable waters via overland flow in a southerly direction [and] a spill to the storm drains does not reach the Sacramento Deep Water Channel³². RX 88, pages 11-13 of 41.³³

IV. COMPLAINANT FAILED TO SUPPORT ITS OVERREACHING PENALTY REQUEST WITH EITHER LAW OR FACT

Complainant paradoxically seeks “at least” the maximum statutory penalty for the violations it alleges VSS to have committed. Complainant’s arguments on liability reveal how riddled with error its allegations are, how haphazardly it has prosecuted the allegations, and how

³² As noted even by EPA’s inspections, the storm drains at the VSS facility are covered. CX 4.

³³ In its Complainant’s Initial Post-Hearing Brief, EPA relied upon Mr. Michaud’s FRP secondary containment analysis, as is addressed above, but did not rely upon Mr. Michaud’s FRP substantial harm analysis and VSS accordingly does not include in this initial brief a critique of Mr. Michaud’s testimony on that subject. However, VSS reserves the right to do so if necessary in subsequent briefing.

VSS has attempted in good faith to comply with EPA's requests, even when disagreeing about whether they are legally well-founded.

For these same reasons, Complainant's arguments on the appropriateness of any penalty are unavailing. With respect to alleged SPCC violations, Complainant has failed to demonstrate that the facts as alleged satisfy the penalty factors such that the alleged violations merit treatment as moderate violations.

As for the alleged FRP violation, Complainant drastically overstates its case; given VSS's good-faith attempts to cooperate with EPA and colorable arguments as to whether an FRP is required, even if the Presiding Officer concludes a violation occurred—which for the reasons stated above it should not—it should not assign a penalty.

Responding to Complainant's allegations in turn, VSS separates the SPCC claims from the FRP claims, and maintains that any penalties for the former should be lower than what EPA suggests, and for the latter, that no penalty is warranted.

A. Complainant's Calculation Of A Penalty For Alleged SPCC Violations Lacks Support In The Record Or Precedent

To support its request of a \$98,865 penalty for the alleged SPCC violations, Complainant relies solely on the purported gravity of the violations. Complainant asserts that the gravity component is based on the seriousness of the violation, which "considers the actual or possible harm," among other factors, in turn requiring an assessment of "the extent of the violation, the likelihood of a spill, the sensitivity of the environment and the duration of the violation." EPA Post-Hrg. Br. 36; *see also id.* at 34. Complainant's bare assertions that the alleged violations match up with the EPA penalty policy, and thus that the statutory maximum is warranted, miss the mark.

1. Complainant has failed to establish, much less allege, that any harm occurred or is possible

Notably, in attempting to justify its penalty assessment Complainant makes no claim (supported or otherwise) that any actual harm has occurred or is possible, or that a spill is likely at all. Indeed, Complainant's only possible reference to harm is of "minor spills" for which Complainant has not alleged any violation of regulatory requirements. In fact, those "minor spills" were of a "latex material" and "diesel," not the asphaltic cement stored in the tanks that are the subject of Complainant's allegations. Tr. 429: 26-25; 430: 1. Complainant admits that "Respondent has maintained most physical improvements to prevent or respond to oil spills." CX 48 at 14. Complainant makes no claims that the tanks it alleges were not included in the SPCC plan in a timely manner are at any risk of discharge—that they may be "massive" in Complainant's estimation is not indicative of tank integrity.

This threshold failure undermines Complainant's entire analysis, and at the very least renders improper Complainant's attempt to levy a penalty at nearly the maximum of the range for what it claims is a "moderate" violation.

What Complainant does allege is that Respondent's *paperwork* documenting the physical adequacy of the facility is inadequate. Even then, Complainant makes no argument about any possible harm that could flow from such violations (*i.e.*, inadequate/incomplete SPCC plan, failure to add new tank to plan, insufficient PE certification), except the alleged "failure to demonstrate testing and inspections." EPA Post-Hrg. Br. 37. And there, Complainant cites no support for its "certain[]" conclusion that such violations affect Respondent's ability to address a discharge. EPA Post-Hrg. Br. 37. But Complainant has not established that such a discharge is likely at all. VSS has established through testimony that testing and inspections have in fact occurred. Tr. 625-29. Additionally, VSS has "everyone trained . . . to take the appropriate

measures if they can safely clean [spills] up and report them and document them and take pictures.” Tr. 430: 12-16. Indeed, this training includes “roughly a 140-some page PowerPoint” and drills. Tr. 430: 19-24.

As such, whether or not the Presiding Officer finds a technical violation regarding testing and inspections, Complainant has not demonstrated that such violations “would have a significant impact on the ability of Respondent to respond to or prevent a discharge at the Facility.” EPA Post-Hrg. Br. 37. Nor does Complainant submit authority supporting its conclusion that paperwork errors ineluctably lead to an inability to respond to an actual discharge. As such, Complainant’s conclusion that this noncompliance should be characterized as “moderate” for purposes of the penalty assessment is unfounded.

Moreover, in implementing a policy applicable to facilities whose storage capacities can exceed hundreds of millions of gallons, such as a refinery, approaching the maximum amount for a facility with a capacity of under 5 million gallons is patently excessive. Complainant cites no authority for the notion that this facility is “large” in comparison with other similar facilities, and no authority for its conclusion that \$45,000 is appropriate, when the maximum under EPA’s penalty policy for moderate violations is \$50,000. CX 40 at 9.

2. Complainant’s adjustments are largely unfounded

Complainant has made no attempt to demonstrate that VSSI’s facility is one “where there could be a major environmental impact from a worst-case discharge” sufficient to satisfy EPA’s penalty policy. EPA Post-Hrg. Br. 38. Moreover, the Presiding Officer found a sufficient issue of fact to require further briefing as to whether the facility could have “reasonably been expected to cause substantial harm to the environment by discharging oil.” Order on Mot. Acc. Liability at 31. Complainant appears to have assumed as much for purposes of its FRP argument, but

assumption is not reality. Although VSSI does not dispute the sensitivity of the environment, EPA cannot increase a penalty by 30% through mere speculation.

Complainant also asserts that it may increase the penalty amount by 30% to account for the length of time that deficiencies in the SPCC plan have existed. EPA Post-Hrg. Br. 38. Not having alleged that any harm flows from the deficiencies it alleges (identified only as “some” in its argument), Complainant cannot support an almost \$20,000 increase in penalty. And as for culpability, given the number of genuine issues of material fact the Presiding Officer found to exist with respect to Complainant’s Complaint, an increase in penalty for “negligent culpability” is an overreach, at best. Even if the Presiding Officer rules in Complainant’s favor, it was far from clear that such a result would obtain.

3. The Presiding Officer should disregard Complainant’s statements regarding an economic benefit from SPCC noncompliance

Complainant’s entire economic benefit calculation rests on calculations it made with respect to the preparation of an FRP. EPA Post-Hrg. Br. 42-44. Averring that it “could have also calculated an economic benefit associated with the delayed and avoided costs for the SPCC violations,” EPA Post-Hrg. Br. 43-44, Complainant nevertheless did not. The Presiding Officer should thus disregard Complainant’s subsequent commentary on the topic, and disregard any implied argument that a penalty should be raised on that basis.

B. The Presiding Officer Should Assign No Penalty If It Rules an FRP Plan To Be Required

Complainant has failed to establish that an FRP is required. As such, no penalty is warranted. If, however, the Presiding Officer disagrees and determines a penalty should be assessed, for the same reasons as identified above with regard to the SPCC penalty, any such penalty should be *de minimis*. VSSI maintains that a FRP plan is not required, and has attempted to negotiate with EPA in good faith, but has complied notwithstanding this position. Moreover,

Complainant has utterly failed to establish any risk of harm flowing from the alleged violation. Indeed, Complainant makes no effort to satisfy its burden to demonstrate the appropriateness of a penalty for the alleged FRP violation separate from the alleged SPCC violations.

V. CONCLUSION

Respondent VSS respectfully requests, for the foregoing reason, that no penalty be assessed as to the SPCC counts (Counts I-IV) or, if a penalty is assessed, that it be *de minimis*, and further respectfully requests that there be no finding that VSS was required to prepare a FRP for its facility but, in the event the Presiding Officer so decides, that no penalty be assessed.

Dated: September 13, 2019

CROWELL & MORING LLP



Richard J. McNeil
Attorneys for Respondent
VSS INTERNATIONAL, INC.

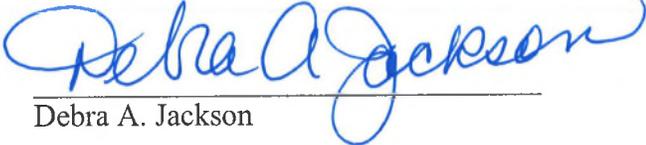
CERTIFICATE OF SERVICE

I, Debra A. Jackson, hereby certify that on September 13, 2019, I caused to be filed electronically, the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S INITIAL POST-HEARING BRIEF** in the Matter of VSS International, Inc., Docket No. OPA 09-2018-0002, with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I, Debra A. Jackson, hereby certify that on September 13, 2019, I served a true and correct copy of the foregoing **RESPONDENT VSS INTERNATIONAL, INC.'S INITIAL POST-HEARING BRIEF** in the Matter of VSS International, Inc via electronic mail to Richard McNeil, attorney for Respondent, at RMcNeil@crowell.com.

Dated: September 13, 2019

Respectfully Submitted,



Debra A. Jackson